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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the Matter of)

Promotion of Competitive Networks in Local
Telecommunications Markets)

WT Docket No. 99-217

Wireless Communications Association
International, Inc. Petition for Rulemaking to
Amend Section 1.4000 of the Commission's Rules
to Preempt Restrictions on Subscriber Premises
Reception or Transmission Antennas Designed to
Provide Fixed Wireless Services)Cellular Telecommunications Industry Association)
Petition for Rule Making and Amendment of the
Commission's Rules to Preempt State and Local
Imposition of Discriminatory And/Or Excessive
Taxes and Assessments)Implementation of the Local Competition)
Provisions of the Telecommunications Act of 1996)

CC Docket No. 96-98/

Reply Comments of the Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy of the United States Small Business Administration ("Advocacy") respectfully submits these Reply Comments to the *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98* ("NPRM")¹ in the above-captioned proceeding, which seeks to promote competitive provision of local exchange services to multiple tenant environments. The Federal Communications Commission ("Commission") proposes rules to require utilities, including local exchange carriers ("LECs"), to provide their competitors with

¹ *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999).

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reasonable and nondiscriminatory access to their rights of way. The Commission also proposes to require building owners to provide reasonable and nondiscriminatory access to their premises.

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305² to represent the views and interests of small business within the Federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.³ Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the RFA.

Small businesses stand on all sides of the issues raised in the NPRM, both among competitors and customers that may benefit from the Commission's proposed policies, and among the LECs and building owners that may bear a burden of responsibility. And the Commission shows some sensitivity to small business concerns. The Commission signals a willingness to narrowly interpret the type of property and equipment to which LECs must grant access, specifically indicating that small LECs may suffer undue burden.⁴ The Commission also suggests exempting small buildings from certain obligations.⁵ Even so, the Commission's attention to small business is inadequate.

Advocacy recognizes that telecommunications competition may benefit small business customers and providers. At the same time, however, nondiscriminatory access requirements may burden small LECs, small apartment building owners, and other small companies. The Commission gives inadequate attention to the burdens its proposed rules may have on small business, and it fails to discuss steps it has taken, or adequate significant alternatives it has

² Codified as amended at 15 U.S.C. §§ 634 (a)-(g), 637.

³ 15 U.S.C. § 634(c)(1)-(4).

⁴ See *NPRM*, paragraphs 37 and 40.

⁵ See *NPRM*, paragraphs 47 and 62 and Initial Regulatory Flexibility Analysis, paragraph 31.

considered, to minimize this impact. The Commission also erroneously excludes small incumbent local exchange carriers ("ILECs") from its definition of small entity. For these reasons, the NPRM and regulatory flexibility analysis do not satisfy the requirements of the Regulatory Flexibility Act of 1980,⁶ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act⁷ (collectively "RFA").

1. The Commission Fails to Properly Identify Small ILECs as Small Businesses.

The Commission's Initial Regulatory Flexibility Analysis ("IRFA") inappropriately excludes small ILECs from the definition of small business, as determined by the Small Business Administration ("SBA") and the RFA.⁸ But the Commission has not consulted with Advocacy, nor does it invite public comment, on this exclusion.

A small business is one that is independently owned and operated and not dominant within its field of operations,⁹ as determined on a national level.¹⁰ The Commission concedes that some ILECs may employ fewer than 1,500 employees, but it inexplicably concludes that each ILEC is dominant within its field of operations (or is not independently owned) and therefore is not a small business.¹¹ The Commission apparently accepts on faith that all ILECs are dominant and/or non-independent, because it offers no evidence of dominance by *any* small

⁶ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁷ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁸ Advocacy has repeatedly brought this matter before the Commission. See e.g. Comments of The Office of Advocacy, U.S. Small Business Administration, *Calling Party Pays*, WT Dkt. 97-207, FCC 99-137 (August 18, 1999); Reply Comments of The Office of Advocacy, U.S. Small Business Administration, *Truth in Billing and Billing Format*, CC Dkt. 98-170, FCC 99-72 (July 26, 1999); Letter from Jere W. Glover, Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to William E. Kennard, Chairman, Federal Communications Commission, CC Dkt. 98-147, CC Dkt. 99-68, CC Dkt. 97-181 (May 27, 1999).

⁹ See 15 U.S.C. § 632(a).

¹⁰ 13 C. F.R. § 121.102(b). See *Size Appeal of Joan of Arc Electric Supply Co.*, No. 4237 (1997), *Size Appeal of George E. Hill*, No. 4222 (1996), *Size Appeal of Control Laser - Orlando, Inc.*, No. 511 (1971).

¹¹ In the context of the 1,371 LECs its rules affect, the Commission indicates that it cannot determine which of these companies fit the definition of small business. But for ILECs, it is suddenly certain that *none* do. See

ILEC.

Perhaps the Commission confines “field of operations” to a local level. The Commission certainly implies that it views ILECs to be locally dominant; the Commission repeatedly refers to ILEC bottleneck control of local facilities. But the local field is not the relevant market, according to the SBA’s definition. And unless the Commission consults Advocacy and invites public comment on a changed definition, the Commission must follow the SBA’s definition and consider dominance on a national basis.¹² Advocacy urges the Commission to reconcile its definition with the SBA’s and recognize small ILECs as small businesses.

This is of particular concern in the context of access rules, where the Commission specifically seeks to “eliminate the market power of the incumbent LECs.”¹³ Advocacy worries that the Commission views all ILECs alike, regardless of their size. But it may well be that smaller ILECs don’t pose the same threats to competition that larger ILECs may, or that heavy-handed regulation may seriously hamper small ILECs in their ability to compete with large national service providers. In any event, the Commission should analyze small ILECs and assess whether the proposed rules may unfairly burden them.

2. The Commission Does Not Sufficiently Discuss the Regulatory Burden on Small Entities Nor Does it Propose Alternatives Designed to Minimize the Burden.

The Commission does not adequately discuss any significant economic impact its access proposal may have on small business nor does it propose sufficient alternatives that might minimize this impact, as is required by the RFA.¹⁴ The IRFA seeks comment on whether its definition of “utility” might be so broad as to burden small building owners, and inquires

NPRM, Initial Regulatory Flexibility Analysis, paragraphs 7 and 8.

¹² See 5 U.S.C. § 601(3).

¹³ See *NPRM*, paragraph 86.

¹⁴ 5 U.S.C. § 603(c).

whether it should limit the scope of its rules to buildings of a certain size.¹⁵ But the Commission should conduct a broader analysis. The Commission should consider all building owners that meet the SBA's definition of small business (not just small buildings), which includes companies earning less than \$5 million in revenue annually. The Commission also should consider what unintended burdens its rules may place on small LECs and the many other small businesses listed in the IRFA.

The Commission proposes exempting small buildings from certain requirements, but offers no alternatives for other affected small businesses. For instance, the Commission should consider alternatives for smaller LECs and ILECs, which lack the resources of larger companies and which may be placed at an unfair disadvantage to larger competitors. At the very least, a proper IRFA must consider four alternatives: (1) differing compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption – either in whole or in part – for small entities.¹⁶ The Commission does not analyze these or any other possible alternatives and has not conducted a proper IFRA. Instead, the Commission invites commenters “to address the economic impact of all of our proposals on small entities and offer any alternatives” and thereby invites others to conduct its IFRA for it.¹⁷ The Commission does not *propose or analyze* alternatives, as required by law.¹⁸ The Commission should carefully analyze compliance burdens, and alternatives that would minimize impact and still achieve its regulatory goals. This is an important part of regulatory flexibility review.

¹⁵ See *NPRM*, Initial Regulatory Flexibility Analysis, paragraph 31.

¹⁶ 5 U.S.C. § 603(c)(1)-(4).

¹⁷ See *NPRM*, Initial Regulatory Flexibility Analysis, paragraph 31.

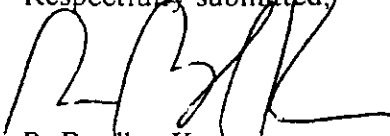
¹⁸ See 5 U.S.C. § 603(c).

Conclusion

The Commission has given some attention to the potential burdens its proposed access rules might place on small buildings and small LECs. But the Commission's treatment of the subject is inadequate. First, the Commission fails to consider small ILECs as small businesses, even though ILECs are fully within the class of entities targeted by this rulemaking. Also, the Commission does not fully discuss unintended regulatory burdens its rules may place on other affected small entities. Nor does the Commission propose sufficient alternatives designed to minimize these burdens.

The Commission undertakes the difficult task of ushering competition into facilities-based telecommunications markets, but it should avoid a one size fits all approach. The Commission should first properly analyze any unintended consequences its rules may have on small business.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Bradley Koerner', written over a horizontal line.

R. Bradley Koerner
Assistant Chief Counsel
for Telecommunications

September 2, 1999